



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 353 OF 2016

JOHN MUONJI NIJAMUDHO.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF NAKURU.....1ST DEFENDANT

JIM MUTURI WAINAINA.....2ND DEFENDANT

RULING

1. This is a ruling in respect of Plaintiff's Notice of Motion dated 20th August 2016, an application pursuant to which the following orders are sought:

1. Spent.

2. Spent.

3. That the honourable court be pleased to stop and injunct the respondents by themselves, their servants, employees and or authorized agents from trespassing on the applicants land parcel LR Plot No. 68 Kampi ya Samaki Gilgil Town, measuring, subdividing the same, placing beacons, issuing allocation letter or title deed, disposing off or allocating the land parcel, dealing and or interfering with the same in any way whatsoever pending the hearing and determination of this suit.

4. That the costs of this application be provided for.

2. The application is supported by an affidavit sworn by the plaintiff. The plaintiff's case is that he is the owner of plot No. 68 Kampi ya Somali Gilgil Town (the suit property) pursuant to an allotment letter issued to him on 27th June 2004 by the 1st defendant. He has been in possession of the plot since the year 2004 and he has fenced it off and built his homestead within it. He accuses the 2nd defendant as well as officers of the 1st defendant of trespassing onto the suit property on 27th July 2016 and again on 5th August 2016. He further states that the 2nd defendant is the owner of plot No. 72 within the same neighbourhood. That parts of the 2nd respondent's plot have been encroached into by other neighbouring plot owners and as a result, the respondents now wish to grab a portion of the suit property and give it to the 2nd respondent.

3. The 1st respondent opposed the application through grounds of opposition filed on 27th July 2017. It is stated in the grounds of opposition that the application is overtaken by events and that the plaintiff has never complied with conditions of allocation of the plot.

4. On his part, the 2nd respondent filed a replying affidavit in which he deposed that he is indeed the owner of plot No. 72 Kampi Ya Somali Gilgil Town having purchased it from an allottee. He added that the suit property does not immediately neighbour his property. Instead, his immediate neighbouring plots are plot numbers 71 and 73. If there was to be any boundary dispute, it would not be between him and the applicant but between him and the owners of those other two plots. He urged the court to dismiss the application.

5. In a further affidavit filed on 23rd January 2018, the applicant deposed that he has made all necessary payments for the plot such as survey fee and showing fee and that he is up to date on payment of rent and rates. He annexed copies of receipts.

6. The application was argued by way of written submissions. The applicant filed submissions on 23rd January 2018, the 1st respondent on 9th November 2017 and 2nd respondent on 14th February 2018. I have considered the application, the affidavit, Grounds of Opposition and the submissions.

7. In an application for an interlocutory injunction, the applicant must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A**

358. He must establish a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction would not to issue if damages can adequately compensate him. Finally, if the court is in doubt as to the answers to the above two tests then the court would determine the matter on a balance of convenience. As was recently held by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, all the three **Giella** conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially and that if *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

8. There is no dispute that the applicant was allocated the suit property by the 1st respondent. Though the 1st respondent alleged in the Grounds of Opposition that the applicant never complied with the conditions of the allocation of the plot, that sort of allegation could not properly be made in the grounds of opposition since it is a statement of fact. It can only come in by way of a statement under oath. In any case, the applicant has demonstrated through his further affidavit that he has made payments to the 1st respondent in respect of the plot. Once again, the 1st respondent has not challenged the applicant's contention through any statement on oath. In the circumstances, I find on the basis of the material before the court that the applicant has demonstrated that he is an allottee in respect of the suit property. Similarly, since the respondent, have not categorically denied trespassing on the suit property, I find that the applicant has established a *prima facie* case. I do not think that damages would adequately compensate him.

9. Though the suit property is captured on the face of the application as plot No.68 Kampi Ya Samaki Gilgil Town, I note that in both the plaint and the supporting affidavit the suit property is stated to be plot No.68 Kampi Ya Somali Gilgil Town. Even the 2nd defendant has stated in his replying affidavit that the suit property is plot No.68 Kampi Ya Somali Gilgil Town. I will therefore go by plot No.68 Kampi Ya Somali Gilgil Town, which is the one stated in the plaintiff's allotment letter, as the correct description of the suit property.

10. In view of the foregoing, I grant an injunction restraining the respondents, their servants, employees and/or agents from trespassing onto the applicant's parcel of land being plot No.68 Kampi Ya Somali Gilgil Town, measuring it, subdividing it, placing beacons on it, disposing of it, interfering with it or dealing with it in any manner whatsoever pending hearing and determination of this case.

11. Costs of the application are awarded to the plaintiff.

Dated, signed and delivered in open court at Nakuru this 27th day of September 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Gitau holding brief for Mr. Gai for Plaintiff/Applicant.

Mr Konosi for 1st Defendant/Respondent.

No appearance for 2nd Defendant/Respondent.

Court Assistant: Gichaba